IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI

In re	)	
	)	
FUTURE TRUST, INC.	)	Case No. 85-03386
	)	
Debtor.	)	

MEMORANDUM ORDER

Finding money in the pocket of an old pair of pants is nice. Finding $167,504.51 is even nicer. The only catch is that the pants have to be yours.

Under 11 U.S.C. §§ 347 and 1143, the debtor or the entity acquiring assets under a plan of reorganization may be entitled to funds which have gone unclaimed for five years. On July 16, 2007, a company known as Omega Consulting, Inc. ("Omega"), acting on behalf of the Debtor's alleged sole shareholder, Table Rock Business Services, Inc. ("Table Rock"), filed a motion under §§ 347 and 1143 in this long-dormant case for disbursement of $167,504.51 in unclaimed funds now on deposit in the registry of the court. The Chapter 11 trustee ("Trustee") who oversaw and liquidated the Debtor's assets objects to Omega's motion, arguing, *inter alia*, that Table Rock/Omega is not "the debtor," and therefore does not have a right to the unclaimed funds under § 347, and that it would be inequitable and improper to permit Table Rock/Omega to claim those funds because the assets of the (then) bankruptcy estate, including the funds at issue here, were obtained through the fraud of the Debtor and Table Rock. The Trustee contends that, instead of Omega, the State of Missouri is entitled to the unclaimed funds because of a previous agreement between the Trustee and the State of Missouri that the State is entitled to recover penalties from the Debtor and Table Rock for their violations of the Missouri Unfair Practices Act.

The Court held an evidentiary hearing on this matter on October 23, 2007.

Upon consideration of the pleadings, the evidence, and relevant law, the Court holds that Omega might have found the money in the pocket, but it ultimately failed in establishing that it is the owner of these well-endowed pants.[1]

BACKGROUND

[1]This opinion constitutes the Court's findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 9014.

At a time when Ronald Reagan was president and The Cosby Show was the number one television show in America, an involuntary bankruptcy case was filed for a Missouri corporation, Future Trust, Inc. The details are hazy, and there is actually little hard evidence before the Court regarding the background of the case. However, the following facts, gleaned from the documents offered into evidence and from a review of the Court's file, are sufficient for the Court to rule on Omega's motion.

The Debtor, Future Trust, Inc. ("Future Trust"), was a pre-need burial insurance business; customers paid Future Trust money to cover their future, anticipated burial expenses. Apparently, Future Trust and its parent company, Table Rock, (among others) misappropriated money Future Trust had received from its customers, and in July 1985, the Stone County Circuit Court appointed a receiver to hold and administer the assets of Future Trust and Table Rock. On September 23, 1985, Future Trust was put into an involuntary Chapter 11 bankruptcy. R. Deryl Edwards ("Trustee") was appointed as the Chapter 11 trustee in the case. On October 17, 1988, the Court entered an order approving a plan of reorganization proposed by the Trustee and directed him to begin making distributions to Future Trust's creditors.

Over the next ten years, the Trustee attempted to distribute all of the Debtor's assets (minus administrative fees), but a substantial sum was never claimed, *i.e.*, the checks were never cashed or were returned as undeliverable. On July 30, 1998, the Court ordered the Trustee to deposit these unclaimed funds into the registry of the Court. Since that time, only three creditors have made any claim to the funds on deposit in the registry.[2] There is $167,504.51 associated with this case currently on deposit with the registry of the Court.

DISCUSSION

Omega traces its claim to the $167,504.51 in unclaimed funds on deposit with the registry of the Court as follows:(1) the Debtor is entitled to those funds under 11 U.S.C. § 347, (2) Table Rock is (allegedly) the Debtor's sole shareholder, (3) Boyd Simons is (again, allegedly) a director of Table Rock, and (4) Boyd Simons, in his capacity as a "Statutory Director & Former Corporate

[2] Interestingly, all three of these claims surfaced in the first two weeks of October 2007 – on October 1, 6, and 10 – and two of the three creditors appear to be represented by Omega's attorney, Brian Baum.

Director," has assigned to Omega Table Rock's rights to the unclaimed funds. None of the links in this chain, however, can withstand the Court's scrutiny.

First and foremost, Omega's claim to the unclaimed funds is without statutory support – which is ironic, considering the heavy emphasis Omega places on 11 U.S.C. § 347(b). Omega claims that § 347(b) "automatically" vests ownership of unclaimed funds in the Debtor (and, by assignment, Omega) five years after confirmation, regardless of what a plan of reorganization might say. Neither the statute nor the Debtor's plan of reorganization supports Omega's argument.

Section 347(b) provides:

> b) Any security, money, or other property remaining unclaimed at the expiration of the time allowed in a case under chapter 9, 11, or 12 of this title for the presentation of a security or the performance of any other act as a condition to participation in the distribution under any plan confirmed under section 943(b), 1129, 1173, or 1225 of this title, as the case may be, becomes the property of the debtor *or of the entity acquiring the assets of the debtor under the plan, as the case may be*.

As the italicized language indicates, the plan is not irrelevant – more than likely, it's controlling. And in this case, it poses an insurmountable hurdle to Omega's claim to the unclaimed funds.

Omega did not offer the Debtor's confirmed plan into evidence, and finding it has requried some considerable digging by the Court. There are several plans on file, and the pleading ultimately confirmed as the plan of reorganization is captioned something entirely different – *i.e.*, "Legal Basis for Trustee's Proposed Chapter 11 Distribution Including A Proposed Immediate Distribution."[3] But it was not impossible to locate this plan, and, as the movant in this matter, it was incumbent on Omega to produce it.

As it turns out, the terms of the plan are fatal to Omega's request. Specifically, at the bottom of page 10 and the top of page 11, the "plan" provides: "That the plan is a plan of liquidation and there shall be no successors, officers or directors, of the debtor...." Under such a plan of liquidation, Omega cannot claim the unclaimed funds as the Debtor, because there no longer is a debtor. Nor can Omega claim the funds as the reorganized debtor, because the plan explicitly provides that there shall be no successor to the Debtor. Under the terms of the plan, the Liquidating Trustee – not the

[3] This pleading contains a request that the Court treat it as a plan of reorganization, and the Court approved it as a plan in an order dated October 17, 1988.

Debtor – acquired the assets of the Debtor.

The second, third, and fourth links of Omega's chain fail for the same reason – in 1985, the Stone County Circuit Court appointed a receiver to hold and administer the assets of Table Rock and Future Trust, and, according to an Annual Registration Report for Future Trust offered into evidence by the Trustee, the receiver, R. Barnes Whitlock, was still the sole director and officer of Future Trust as of 1996. Omega has not produced any evidence to show that the Debtor's or Table Rock's assets were ever returned to the original shareholders or the that the original directors and officers ever regained control of those entities. In the absence of such proof, the Court concludes that Table Rock has no claim as a shareholder to the Debtor's assets, that Boyd Simons has no authority to conduct any business on behalf of Table Rock, and in the absence of such authority, Omega's assignment is void and meaningless.

For all of these reasons, the Court will deny Omega's motion for disbursement of the unclaimed funds.

Omega's Attorney's Fees

Initially, the Court was inclined to grant Omega its attorney's fees whether or not it prevailed on its motion. Just bringing this matter to the Court's attention deserved a token of recognition. This inclination changed, however, when it became apparent that Omega had not adequately prepared for the hearing or thoughtfully considered the issues presented by its own motion.

In addition to Omega's utter failure to address the plain language of §347, which clearly implicates the terms of a plan, Omega failed to explain Boyd Simons's absence at the hearing despite the Court's directive for him to appear and to present evidence as to the ownership interests in the Debtor and any agreements made with Omega in this matter. Omega also failed to offer any evidence regarding the true nature of its agreement with Boyd Simons. At the hearing, counsel for Omega admitted that the document assigning Table Rock's (purported) interest in the unclaimed funds did not reflect the fact that Omega had agreed to share the unclaimed funds with Boyd Simons.

Finally, the Court is troubled by what it perceives may have been a lack of candor on Omega's part. Specifically, Omega offered Table Rock's 1984 Annual Registration to establish that Boyd Simons is a "statutory and former director of Table Rock." However, a cursory search of the Missouri Secretary of State website reveals not only that are there more recent Annual Registrations

on file for Table Rock (up to 1996), but that the 1984 registration is the last year Boyd Simons was a director of Table Rock. The very next year, Boyd Simons was replaced by the state court appointed receiver, R. Barnes Whitlock.[4] This coincidence does not reflect well on Omega. For these reasons, the Court will deny Omega's request for attorney's fees.

The Trustee's Proposal

Having determined that Omega is not entitled to the unclaimed funds, the million dollar (or at least $167,504.51) question is what should be done with the unclaimed funds. The Trustee argues that the funds should be disbursed to the State of Missouri pursuant to a stipulation between the Trustee and the State of Missouri, executed on December 22, 1988, whereby the Trustee agreed that the State of Missouri is entitled to penalties recovered from the defendants for payment into the state Merchandising Practices Revolving Fund. The Trustee's suggestion has appeal, but the evidence before the Court at this juncture does not support the State of Missouri's claim to the funds. The stipulation doesn't actually assess penalties against the Defendants, it just provides that the State of Missouri is entitled to do so, and the other document offered by the Trustee in support of his suggestion – a state court petition filed against Future Trust and Table Rock seeking $100,000 in penalties – doesn't advance his argument because the Trustee hasn't offered any evidence that a judgment or order on that petition was ever entered.

The Court would like to see the unclaimed funds put to a good use. The money is not doing anyone any good languishing in the registry of the Court. Therefore, the Court will keep this case open for 90 days to give the Trustee an opportunity to explore an appropriate and feasible disposition of the unclaimed funds. The Trustee will be entitled to his reasonable expenses and attorney's fees, including the $1,614.92 already requested, for these services, and may be entitled to reasonable compensation based on the amount of unclaimed funds distributed. The Trustee's fees and expenses will be paid upon distribution of the unclaimed funds or the re-closing of this case,

[4] Under normal circumstances, the Court would not discuss evidence outside the record, but the Court will make an exception here where it: (1) discovered this evidence after it had already decided to deny Omega's request for attorney's fees, and (2) the grant or denial of Omega's attorney's fees in this matter is an entirely equitable matter, and the Court has greater latitude in what it may consider in making an equitable determination.

whichever comes first.[5]

Therefore, for the reasons stated above, it is

ORDERED that Omega's motion for payment of unclaimed funds, including its request for attorney's fees, is hereby DENIED. It is

FURTHER ORDERED that the Trustee's Application for Compensation filed on October 30, 2007, in the amount of $1,614.92, is hereby GRANTED, although payment of this compensation from the registry of the Court is postponed until the earlier of the distribution of the unclaimed funds or the re-closing of the case. It is

FURTHER ORDERED that the Trustee shall have 90 days to explore an appropriate and feasible disposition of the unclaimed funds and to take all necessary actions to accomplish a distribution. The Trustee is directed to apprise the Court of his progress within 60 days of the entry of this order.

SO ORDERED this 16th day of November, 2007.

/s/ Jerry W. Venters
United States Bankruptcy Judge

A copy of the foregoing mailed electronically or conventionally to:
J. Kevin Checkett
Brian Baum
Thomas L. Williams

[5] The Court would be willing to consider an interim application for fees and expenses if the Trustee can demonstrate good cause for such an application.